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SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

LC2015-000157-001 DT 06/30/2015

COMMISSIONER MYRA HARRIS

CLERK OF THE COURT
J. Eaton
Deputy

ELLIOTT GLASSER

DAVID W DOW

v.

ANDY SBILRIS (001)

MARC C CAVNESS

ENCANTO JUSTICE COURT
REMAND DESK-LCA-CCC

HIGHER COURT RULING / REMAND

Lower Court Case No. CC2012-174178 RC.

Plaintiff-Appellant Elliot Glasser (Plaintiff or Mr. Glasser) appeals the Encanto Justice Court's determination that found (1) he was not entitled to enforce a lease against Defendant-Appellee Andy Sbilris (Defendant or Dr. Sbilris); and (2) he was responsible for Dr. Sbilris' attorneys' fees. Plaintiff contends the trial court erred. For the reasons stated below, this Court reverses the trial court's judgment.

I. FACTUAL BACKGROUND.

During October-November, 2011, Mr. Glasser acquired the building where Defendant—Dr. Sbilris— maintained his chiropractic offices.[1] Mr. Glasser testified he had a short meeting with Dr. Sbilris after he purchased the property but did not talk about the lease.[2] Dr. Sbilris continued in his possession of the property and paid rent until March 2012, when Dr. Sbilris left the premises.[3] Mr. Glasser was unsuccessful in his attempt to re-rent the premises and the building remained empty between March and December 31, 2012[4]—the remaining term left on the original lease Dr. Sbilris negotiated with Mr. Glasser's predecessor in interest.

[1] Trial transcript, August 14, 2014, at p. 13, ll. 1–9.
[2] *Id*. at p. 14, ll. 1–6.
[3] *Id*. at p. 14, ll. 13–21.
[4] *Id*. at p. 15, ll. 1–16.

Mr. Glasser reviewed the one page lease agreement and agreed he was required to pay for (1) trash pickup; (2) janitorial services; (3) water; (4) gas; and (5) building maintenance and repair but clarified the lease did not state he would do those things—only pay for them.[5] He added he had some of his workmen at the premises for two or three weeks after he first acquired the property and thereafter had his workmen return to the premises and clean several times a week.[6] In addition Mr. Glasser said he had his workmen (1) cut a doorway between Dr. Sbilris' office and the bathroom so Dr. Sbilris could have a private bathroom; and (2) change the electric so the light switch was near Dr. Sbilris' office.[7]

Mr. Glasser discussed Dr. Sbilris' March, 2012 letter notifying him of Dr. Sbilris' intent to move because of problems with janitorial services and heat although there had been no indication about a heating problem in the months prior to March, 2012.[8] He added he immediately contacted Soutwest Gas and had the heat turned on.[9] He added he let Dr. Sbilris use three additional offices without charge because those offices were not currently occupied;[10] had a trash service—Republic Trash Company—maintain a trash bin; and had employees put in a new wall and perform landscaping.[11] Mr. Glasser described granting Dr. Sbilris a $100.00 credit on his rent after Dr. Sbilris claimed the carpet was wet.[12]

Mr. Glasser discussed the lease agreement Dr. Sbilris signed and said he—Mr. Glasser—did not purchase the property at a foreclosure sale. Mr. Glasser also testified about other expenses he sustained for repairs to the property. He identified a letter he received from defense counsel which stated he failed to provide specific services but did not state he refused to pay for these services.[13]

On cross-examination defense counsel asked Mr. Glasser if he was a party to the lease agreement and Mr. Glasser stated he was a party as a landlord although his name was not on the agreement.[14] He stated he did not know the building operated on gas heat or that four of the five rooms rented to Defendant did not have gas heat even after the gas was turned on.[15] Mr. Glasser stated he provided what people were entitled to if they requested it, but the lease did not require him to provide a janitor on a day-to-day basis.[16] He agreed he closed off access to one of the bathrooms after the bathroom door was put in; and denied he asked Dr. Sbilris to move Dr.

[5] *Id*. at p. 17, ll. 1–9.
[6] *Id*. at p. 17, ll. 10–24.
[7] *Id*. at p. 18, ll. 1–24.
[8] *Id*. at p. 20, ll. 14–25; p. 21, ll. 1–5.
[9] *Id*. at p. 21, ll. 5–12.
[10] *Id*. at p. 22, ll. 14–20.
[11] *Id*. at p. 22, ll. 21–25; p. 23, ll. 4–9.
[12] *Id*. at p. 23, ll. 14–19.
[13] *Id*. at p. 26, ll. 10–19; Exhibit 6.
[14] *Id*. at p. 28, ll. 5–12.
[15] *Id*. at p. 29, ll. 7–16.
[16] *Id*. at p. 29, ll. 18–23.

Sbilris' files from the three rooms Dr. Sbilris did not rent but was using.[17] Mr. Glasser denied that (1) Dr. Sbilris told him the agreement with General Power Professional Plaza indicated things Dr. Sbilris was supposed to have; (2) Dr. Sbilris asked Mr. Glasser to provide these services; or (3) he—Mr. Glasser—said he did not provide those items to any of his properties.[18] Defense counsel asked about the transfer of the property; and the price paid.[19]

On redirect, Mr. Glasser explained he was not involved in any foreclosure.

Mr. Spence testified for Mr. Glasser and stated he worked as a property manager for Mr. Glasser.[20] He described the upgrades and work he performed at the property and stated he did not recall Dr. Sbilris stating he did not have heat or that he needed more janitorial services.[21] On cross-examination he stated there was no janitor for the property and said he picked up weeds on a weekly basis.[22]

Dr. Sbilris testified on his own behalf (1) he had no written or verbal contract with Mr. Glasser; and (2) Mr. Glasser never told him he was an assignee of a rental agreement between General Power Professional Plaza and Dr. Sbilris.[23] He stated Mr. Glasser came to his office and informed him he bought the building and told him the rent would be the same as on the lease and where the rent should be sent.[24] Dr. Sbilris stated he asked about the list of the owner's responsibilities which stated specified building expenses shall be paid by General Power Professional Plaza.[25] He maintained he called after Mr. Glasser bought the building and "they said" the heat had been turned off and there was a $1,000.00 deposit because of nonpayment.[26] Dr. Sbilris stated he bought space heaters for heat but they were inadequate.[27] He said he (1) told Mr. Glasser about the problem regarding the lack of heat; and (2) also lacked hot water.[28] He asserted he had no janitorial service and his own employees cleaned the office for approximately $10.00 per hour; and he described a problem with homeless people being at the property.[29] Dr. Sbilris spoke about a problem when the toilet malfunctioned and the water leaked into his office and said Mr. Glasser repaired the leak but, instead of cleaning up the premises, he was told to clean it up himself.[30] Dr. Sbilris said he deducted $100.00 from the rent that month.

[17] *Id*. at p. 30, ll. 21–25; p. 31, ll. 1–6.
[18] *Id*. at p. 33, ll. 4–14.
[19] *Id*. at p. 34, ll. 8–25; pp. 35–38; p. 39, ll. 1–22.
[20] *Id*. at p. 41, ll. 12–16; p. 43, ll. 9–19.
[21] *Id*. at p. 42, ll. 1–19.
[22] *Id*. at p. 44, ll. 1–25; p. 45, ll. 1–23.
[23] *Id*. at p. 47, ll. 4–10.
[24] *Id*. at p. 47, ll. 16–25.
[25] *Id*. at p. 48, ll. 2–6.
[26] *Id*. at p. 48, ll. 18–20. Dr. Sbilris did not identify who "they" were.
[27] Trial transcript, *id*., at p. 48, ll. 21–25; p. 49, ll. 21–24.
[28] *Id*. at p. 50, ll. 3–15.
[29] *Id*. at p. 50, ll. 17–25; p. 51, ll. 1–16; p. 54, ll. 22–24.
[30] *Id*. at p. 53, ll. 8–25; p. 54, l. 1.

Dr. Sbilris testified about the parties' dealings after he informed Mr. Glasser of his intent to move at the end of March. He said Mr. Glasser tried to fix the heat toward the end of March but was only able to provide heat to Suite G.[31] He described his alleged loss of patients as well as his new premises where he paid $1000.00 in rent but had janitorial services as well as heating and cooling.[32] He also explained that although Mr. Glasser believed the lease agreement stated the landlord needed to pay for the janitor but did not need to provide the janitorial service, he assumed the janitor would be provided and the prior landlord had furnished a janitor.[33] He said (1) the same problem occurred with the gas, and the building maintenance and repairs; and (2) he often needed to paint over the graffiti.[34]

On cross-examination, Dr. Sbilris agreed his corporate report was filed one day after he notified Mr. Glasser about the problems with the building and included his new address rather than the address at the premises.[35] He also agreed the lease agreement did not specify the landlord would provide the listed services but only that it said the landlord would pay for these services.[36] He confirmed he never provided a bill to Mr. Glasser for the cleaning services his employees allegedly provided or for trash pickup, water, or gas.[37] He also admitted he never sent Mr. Glasser written notice (1) about not having any heat during November, December, January, or February; or (2) informing Mr. Glasser he needed to contact Southwest Gas.[38] Dr. Sbilris stated (1) he had no documentation about requesting any of these services; (2) the parties discussed this during the meeting when Mr. Glasser told him about the rent; and (3) Mr. Glasser stated he did not supply these items to other tenants so he would not do it here.[39] Dr. Sbilris also agreed he had no hard evidence about any complaints he made to the prior landlord about the condition of the building.[40] He spoke about deducting the $100.00 from the rent to handle the water damage but confirmed he did not deduct any other amounts for services during the five months he occupied Mr. Glasser's premises.[41] Dr. Sbilris agreed he did not send any written notice to Mr. Glasser about the heat although he said he was concerned about the problem in November, 2011; and explained his reason for the lack of writing as his having had a problem with the previous owner that was not rectified.[42]

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[31] *Id*. at p. 54, ll. 16–21.
[32] *Id*. at p. 55, ll. 4–25; p. 56; p. 57, ll. 1–18.
[33] *Id*. at p. 57, ll. 18–25.
[34] *Id*. at p. 58, ll. 1–17.
[35] *Id*. at p. 59, ll. 10–25; p. 60, ll. 1–23.
[36] *Id*. at p. 61, ll. 16–25; p. 62, ll. 1–3.
[37] *Id*. at p. 62, ll. 4–25.
[38] *Id*. at p. 63, ll. 1–6.
[39] *Id*. at p. 63, ll. 6–16.
[40] *Id*. at p. 64, ll. 13–25.
[41] *Id*. at p. 65, ll. 14–23.
[42] *Id*. at p. 67, ll. 19–25.

Dr. Sbilris also testified about forming a corporation and agreed he filed his corporation with the Corporation Commission on March 6, 2012, and had his new address by that date.[43] He explained he moved because he was building his practice and the premises were not good for his business.[44] Dr. Sbilris agreed he had no documentation about his alleged loss of business or alleged loss of income.[45]

Mr. Jason Hernandez, one of Dr. Sbilris' patients testified he noticed it was cold in the building and there were space heaters for heat.[46] He said he informed Dr. Sbilris (1) when there were weeds growing in the planters; (2) scattered trash in the parking lot; and (3) encouraged Dr. Sbilris to request the city remove the graffiti or go to "Graffiti Busters" and request paint.[47]

On cross-examination Mr. Hernandez said he was unaware of any city notices to Mr. Glasser about maintaining the premises and explained this as resulting from his proactive approach.[48] He acknowledged he never spoke with Mr. Glasser but said he saw Dr. Sbilris pulling weeds and picking up trash.[49]

At the trial's conclusion the trial court took the matter under advisement. On October 27, 2014, the trial court issued a Minute Entry explaining its decision. The Minute Entry stated—in relevant part:

> The original landlord in this case, General Power Professional Plaza, LLC had a one page lease with the tenant, Dr. Sbilris. The landlord had financial difficulties, defaulted on what it promised Dr. Sbilris, and told him he could leave.
>
> The Plaintiff, Mr. Glasser, bought the property at a short sale and did not obtain an assignment of the lease from the original owner or an estoppel certificate from Dr. Sbilris.
>
> Dr. Sbilris moved out. Plaintiff's claim that it can enforce the lease fails because there is no writing binding Dr. Sbilris and Mr. Glasser. Dr. Sbilris was a month-to-month tenant acquired when Mr. Glasser bought the building, who could terminate with a 30-day notice.

Plaintiff filed a timely appeal. This Court has jurisdiction pursuant to ARIZONA CONSTITUTION Art. 6, § 16, and A.R.S. § 12–124(A).

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[43] *Id.* at p. 68, ll. 10–21.
[44] *Id.* at p. 69, ll. 1–3.
[45] *Id.* at p. 69, ll. 12–22.
[46] *Id.* at p. 71, ll. 3–19.
[47] *Id.* at p. 72, ll. 1–13.
[48] *Id.* at p. 73, ll. 21–23; p. 74, ll. 1–4.
[49] *Id.* at p. 74, ll. 5–16.

II. ISSUES:

A. Did The Trial Court Err By Finding Plaintiff Was Not Entitled To Continue The Lease Defendant Made With the Prior Landlord.

The Standard of Review

Appellate courts are not bound by the legal determinations of the trial court.

> This court may draw its own legal conclusions from facts found or inferred in the judgment of the trial court, and we are not bound by the findings of the trial court in questions of law or mixed questions of law and fact. *Huskie v. Ames Bros. Motor and Supply Co., Inc.,* 139 Ariz. 396, 401, 678 P.2d 977, 982 (App.1984).

Ponderosa Plaza v. Siplast, 181 Ariz. 128, 135, 888 P.2d 1315, 1322 (Ct. App. 1993). The review is *de novo*. *City of Tucson v. Clear Channel Outdoor, Inc.,* 218 Ariz. 172, 181 P.3d 219 16 (Ct. App. 2008).

The Trial Court's Determination

In ruling on this case, the trial court signed a Judgment stating (1) the original landlord—General Power Professional Plaza, LLC—(1) sold the property to Plaintiff; (2) defaulted on what it promised to Dr. Sbilris; and (3) told Defendant "he could leave."[50] The Judgment also stated (1) Plaintiff bought the property at a short sale; (2) Plaintiff did not obtain an assignment of the lease from the original owner; and (3) Plaintiff failed to obtain "an estoppel certificate from Dr. Sbilris." The Judgment said:

> Plaintiff's claim that it can enforce the lease fails because there is no writing binding Dr. Sbilris and Mr. Glasser.

The lack of a writing appears to be the basis for the trial court's determination that Mr. Glasser was not entitled to stand in the shoes of his predecessor in interest— General Power Professional Plaza, LLC. Mr. Glasser opposed this position and argued the purchaser of land assumes all leases related to the land and the lessee is bound to that contract. The legal term for Mr. Glasser's position is based on an attornment[51] which has been defined as:

> An attornment is a continuation of the existing lease upon the same conditions in all respects, simply putting another in the place of the original landlord. There is a new tenancy only when the terms and conditions of the original lease are departed from.

[50] Judgment signed January 7, 2015. However, there is little support in the testimony for the proposition General Power Professional Pl, LLC told Dr. Sbilris he could leave as there was no testimony from anyone connected with General Power Professional Plaza, LLC. Furthermore, Dr. Sbilris affirmed the original lease by electing to remain at the premises after Mr. Glasser became the new owner.

[51] The original meaning of an attornment stems from feudal English law where it was considered unreasonable for a tenant to be subject to a new lord without the tenant's approval. A written attornment has not been required since the time of Queen Anne—1705.

Austin v. Ahearne, 61 N.Y. 6, 6 (1874).[52] Arizona recognized this common law principle in *Patterson v. Connolly*, 51 Ariz. 443, 77 P.2d 813 (1938). In *Patterson v. Connolly*, the defendants—Mr. and Mrs. Patterson—leased premises and, thereafter, the original landlord sold the property to another. The Pattersons maintained Mr. Connolly—the new purchaser of the property—did not state a cause of action because he was not the original landlord. Our Supreme Court disagreed and held:

> At common law, when the owner of premises made a grant of a reversion to a third party, an attornment was necessary to create the relation of landlord and tenant between the original lessee and the new owner. This rule, however, was changed early in the eighteenth century by 4th Anne, c. 16, pars. 9 and 10, which dispensed with the necessity for an attornment to confer upon the grantee of the reversion all the rights and remedies of a lessor. We have held in the case of *Masury & Son v. Bisbee Lumber Co.*, 68 P.2d 679, that the common law of Arizona included the English common law as amended by statute down to the time of the severing of the union between the colonies and the mother country. **Under the law of Arizona, therefore, when plaintiff bought the property from Angle, he had all the remedies which Angle possessed for a breach of the lease,** and the action was brought in the name of the proper party if there had been a violation of the lease which entitled the owner of the reversion to recover possession of the premises. **When a reversion is transferred without a reservation of the rent, the grant conveys the lessor's interest in the unexpired lease, and the purchaser will be entitled to the future rents and profits**. Taylor v. Kennedy, 228 Mass. 390, 117 N.E. 901; Benjamin v. Northwestern F. & M. Ins. Co., 119 Minn. 27, 137 N.W. 183, 41 L.R.A.,N.S., 395; 36 C.J. 364, and cases cited. By the terms of the lease a payment of $100 rent was due on the 15th day of July, 1936, after Angle had transferred the reversion to Connolly.

Patterson v. Connolly, 51 Ariz. at 445-46, 77 P.2d at 813-14 (emphasis added). Because our Supreme Court held a subsequent owner of property had all the remedies of the original owner for a breach of the lease the trial court should have found there was legal basis for Mr. Glasser to prevail. The trial court found otherwise and determined Mr. Glasser's attempt to enforce the lease failed because there was no writing between Mr. Glasser and Dr. Sbilris. However, based on *Patterson v. Connolly, id.,* Defendant was liable under the lease he negotiated with Mr. Glasser's predecessor in interest.

[52] Our Supreme Court held that most of the jurisdictions of this country take judicial notice of the laws of its sister states." *Prudential Ins. Co. of Am. v. O'Grady*, 97 Ariz. 9, 12, 396 P.2d 246, 248 (1964). The Arizona Supreme Court said "We therefore hold that the constitution, statutes and reported court decisions of our sister states are a proper subject for judicial notice." *Prudential Ins. Co. of Am. v. O'Grady*, *id.*, 97 Ariz. at 13-14, 396 P.2d at 249.

In ruling in favor of Dr. Sbilris, the trial court noted Mr. Glasser did not obtain an assignment of the lease from the original owner or an estoppel certificate from Dr. Sbilris. Defendant presented no law showing an assignment of the lease or an estoppel certificate was mandatory in order for Mr. Glasser to continue the lease. This Court has found no binding authority supporting a mandatory requirement for an estoppel certificate or an assignment before a new landlord may proceed to enforce a lease with an existing tenant.

In this case the resolution of the question was one of law. The trial court acknowledged the dispute was primarily a legal dispute when it commented:

> And I will let, preface my invitation to closing argument with repeating my earlier observation that this is an interesting contractual case, but I haven't heard a real material factual dispute here. I see an authentic legal issue to decide, but I think the facts are pretty much agreed by everybody what the facts in this case are.[53]

Because the matter is a question of law, it is this Court's final responsibility to make the legal determination and, where appropriate, substitute its judgment for that of the trial court. Accordingly, this Court finds Mr. Glasser had the ability to enforce the lease and the trial court erred when it ruled in favor of Dr. Sbilris because Mr. Glasser had no written assignment or contract binding Dr. Sbilris.

B. Is Plaintiff Entitled To Attorneys' Fees For The Justice Court Action.

Plaintiff should have prevailed at the Justice Court. Because this matter sounded in contract, Plaintiff is, pursuant to A.R.S. § 12–341 and § 12–341.01, entitled to costs plus reasonable attorneys' fees. This matter is remanded to the trial court for it to determine Plaintiff's costs plus a reasonable attorneys' fee.

C. Is Plaintiff Entitled To Attorneys' Fees On Appeal.

Attorneys' fees on appeal are discretionary pursuant to Rule 13, SCRAP—Civ. Any attorneys' fee award is subject to A.R.S. § 12–341.01 and is only available for reasonable fees. Although Plaintiff did succeed with his appeal, this Court declines to award Plaintiff any attorneys' fees because his legal memorandum was effectively a rehash of his trial court motion. Attorneys' fees pursuant to A.R.S. § 12–341.01 are permissible and not mandatory.

> The language is permissible, and there is no requirement that the trial court grant attorney's fees to the prevailing party in all contested contract actions.

Autenreith v. Norville, 127 Ariz. 442, 444, 622 P.2d 1, 3 (1980). Accordingly, this Court declines to award Plaintiff compensation for his counsel's work on the appeal.

[53] Trial Transcript, *id.*, at p. 75, ll.24–25; p. 76, ll. 1–2.

III. CONCLUSION.

Based on the foregoing, this Court concludes the Encanto Justice Court erred when it found Plaintiff could not prevail on his action because there was no writing binding Dr. Sbilris and Mr. Glasser.

IT IS THEREFORE ORDERED reversing the judgment of the Encanto Justice Court.

IT IS FURTHER ORDERED remanding this matter to the Encanto Justice Court for all further appropriate proceedings.

IT IS FURTHER ORDERED signing this minute entry as a formal Order of the Court.

/s/ Myra Harris
THE HON. MYRA HARRIS
Judicial Officer of the Superior Court 063020151257

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